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NO. 80 - 1381

SUPREME COURT OF THE UNITED STATES

_____TERM 1981

J. R. CISSNA AND EVELYN CISSNA,
His wife,
Petitioner,

v.

ROY E. AMMAN, et al.,
Respondent Class.

IN THE MATTER OF THE PETITION OF J. R. CISSNA FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO "BRIEF OF RESPONDENTS AMMAN, ET AL."

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IN THE

SUPREME COURT OF THE UNITED STATES

TERM 1981

J. R. CISSNA and EVELYN CISSNA, his wife,

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ROY E. AMMAN, et al.,

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PETITIONER'S REPLY TO "BRIEF OF RESPONDENTS AMMAN, ET AL."

The Respondent's Brief, opposing the Petition for Writ of Certiorari, Argues:

(1) *"The statement of the case is an argument of disputed facts."* This is simply not the case and no specifics are given to support the assertion.

(2) *Petitioner's objection to being excluded from pretrial participation was*

cured by" ....petitioner's suggested issues were included in the pre trial order." This substitute for the usual accepted participation by all parties in preparation of a pre-trial Order was not only manifestly unfair, but was a direct contributing cause of the improper Instructions to the Jury, Petitioner contends.

The Instructions failed to (a) identify what was stated by the Petitioner Cissna that made necessary the disclosure of a material fact or facts not disclosed, and (b) the identity of the alleged material non-disclosure.

(3) *The petitioner objects to the trial court's refusal to submit further interrogatories to the jury after it had returned a verdict in accordance with instructions it had received.* This post-verdict motion, before the Jury was dismissed in the Trial Court, was simply a further opportunity afforded the Trial Court to cure the deficient jury instructions by identifying what duty had been violated that supported a $3 Million Judgment for non-disclosure. Otherwise, we now have the anomaly of a "non-disclosed non-disclosure."

(4) *"There is no judgment against the seller, Federal Shopping Way....It is in bankruptcy."* True. These purchasers (the Class) did not receive the

"judgment in favor of all members against" the defendant seller "declaring that the members of the class own the land and building" nor otherwise. (Quotes are from the Notice [Appendix C, p.A-8 Petition]) Instead the result (without the consent of the Class nor any prior Notice) is a Bankruptcy Judge's Order allowing a Creditor's claim against the Bankrupt Seller. In a narrow sense, not a "Judgment", but a needless dilution of the net asset of the Seller corporations in which so many members of the Class were also stockholders and creditors. Their participation in the assets were thereby needlessly diluted. Naturally, many consider this action

the cause of the bankruptcy of their company. A result diametrically opposite to the object of the Securities & Exchange Law, as the decision now stands.

(5) *"The statement at page 15 of the petition that S.E.C. vs. F.S.W. and J. R. Cissna, 433 F.2d 148 (9 Cir. 1970) was reversed by Owners vs. McQuaid, 513 F.2d 558 (9 Cir 1975) is not correct."* The statement on page 15 of the Petition is accurate. The statement in S.E.C. vs. F.S.W. and J. R. Cissna (1970) that there had been "gross fraud" was predicated on District Court Judge Murray's and the Trial Court's legal conclusion that the instruments did not transfer real estate title to the purchaser, which if true would have been a "gross fraud." The 9CCA 1975 case of Owners v. McQuaid, 513 F.2d 558 Reversed the same trial Judge, District Judge

Murray, finding sales instruments by the same Seller, Federal Shopping Way, Inc., identical in form, did transfer real estate title, stating:

> " 'In summary, the undivided interests, intrinsically and in terms of public policy, should not be considered real estate. If anything, they are securities.' "

"With this mixed finding of fact and of law we cannot agree."

The grounds of the "gross fraud" in S.E.C. v. F.S.W. and J. R. Cissna, 433 F.2d 148 (1970) are stated in the above subquotes. Thus, the accuracy of the page 15 statement "Moreover, grounds on which that ruling (S.E.C. vs. F.S.W. et al.-1970) was made was later reversed by the Ninth Circuit Court of

Appeals [Appendix H, Owners v. McQuaid, 513 F.2d 558 (1975)]cannot be disputed.

(6) *"Collateral estoppel bars review. Petitioners are foreclosed from disputing the result below by the doctrine of collateral estoppel."* The respondent and the Court of Appeals rely on the principle of offensive collateral estoppel, without concern for the clear limitations as set forth in Parklane Hosiery Co. Inc. v. Shore, 99 S.Ct. 645, 349 U.S. 322, 59 L.Ed. 2nd 552.

The limitations by the foregoing decision clearly exclude the S.E.C. v. F.S.W. and J. R. Cissna case 433 F.2d 148 (9th Cir 1970) from application of the principle of offensive collateral estoppel as a bar to the petitioner in this case.

Those three limitations, quoting from the Parklane case, supra, include:

> First: "If a defendant in the first action is sued for small or nominal damages he may have little incentive to defend vigorously ...."

The defendant Cissna in the S.E.C. case was not sued for any amount of money damages and had no interest nor did the restrainer in that action deprive Cissna of any existing interest or prospective profit from the sales enjoined. In fact, the seller, Federal Shopping Way, had disposed of all of its equity in the real estate prior to the injunction.

> Second: " Allowing offensive estoppel may also be unfair to the defendants if the judgment relied upon [S.E.C. v. F.S.W. and J. R. Cissna] as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendants."

The S.E.C. case (1970) was directly inconsistent with the previous decision by the late Honorable Judge Charles Wright (while Superior Court Judge - later Chief Justice of the Washington State Supreme Court) in Brett v. Lonctot (see Appendix F, defining sales of real estate by Federal Shopping Way as not being a security). Supporting the above quoted limitation as it applies to the 1970 S.E.C. case is both the reference to Owners v. McQuaid, supra, and also the judgment in the Federal District Court case of (1970) United States v. Cissna, No. 51960. Athough the decision was based on fact there was no fraud nor duty violation by J. R. Cissna, Judge McNichol

added that he entertained "at least a reasonable doubt that the sales involved fall within the legal status of securities." (See quotes from that decision, Appendix E of the Petition, pages A-12 through A-17.)

> Third: "Still another situation where it might be unfair to apply offensive estoppel is where the second action affords the defendant procedural opportunities unavailable in the first action, that could readily cause a difference in results."

In the regulatory action, seeking a restrainer and receiver pendente lite, there could be none of the procedural opportunities available in that action that should have been available in this 10b5 suit for millions.

The opinion of the Court in the Parklane case, despite the application of estoppel in that case skirting the constitutional question on which Mr. Justice Renquist based his dissent, concluded that in Parklane the defendant had had "a full and fair opportunity to litigate: and that was the "defendant's most significant safeguard", but that

> "the general rule should be that in cases where ...the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel."

A fortiori an appellate Court of Appeals in this case should not allow the use of the 1970 S.E.C. injunction case to bar a defense in this 10b5 case.

(7) *"The ninety day limit for the petition expired on February 5, 1981. The affidavit of service of the petition,..shows that he mailed...it to the Court on February 6, 1981."* Prior to the Clerk docketing the case as of February 5,1981, No. 80-1381, the party signing the original affidavit filed a "Corrected affidavit of service..." (App. A, this Reply) which stated

> "that on February 5, 1981 the affiant deposited an envelope...I am informed apparently the after hour mailing date resulted from the date on the postal meter being set forward before the expiration of the day."

Being Pro Se, this Petitioner asked a member of the Bar of this Court to review the filing and provide the Clerk and Court with

Confirmation of its timeliness. That affidavit is attached as Appendix B.

If, for any reason, the Court deems the filing may not be timely, the Petitioner requests an opportunity to make an appropriate Motion pursuant to the discretion of the Court as exercised in Schact vs. United States, 308 U.S. 68. It will be noticed the respondent on page 3 of his Reply states. *"The Court of Appeals denied rehearing on November 7, 1980"* in San Francisco and the affidavit Appendix B shows the receipt by the Petitioner in Seattle of that Order November 10, 1980, and that FRCP Rule 6(e) states:

"Whenever a party...is required to do or take some proceedings within a prescribed period after the service of a notice or other paper upon him, and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period."

The date relied upon by the respondent is February 6, 1981, in claiming it was *"filed too late"*. The correcting affidavit assumed "the postal meter was set forward before the expiration of February 5, 1981." If the date of receipt or FRCP Rule 6(e) is adopted, the 90th day would be Sunday, February 8,1981, viz, Monday, February 9, 1981 or 4 days or 3 days after the actual day filed.

The case was timely docketed by the Clerk. The record is clear, and no detriment claimed by the respondent.

CONCLUSION

The Respondent's brief amplifies and clarifies the special and important reasons for granting this Writ of Certiorari in respect to the need for resolving by this Court the important questions of Class Action; the efficacy of reliance on the stari decisis as opposed to depriving a party of defense by an overbroad application of collateral estoppel; recognizing the conflict between Courts of Appeals in respect to required specificity, particularity and identity of alleged non-disclosures of a material fact from the FRCP Rule 9 phase to the Jury instructions stage; the departure from the true intent of the

Securities & Exchange Law to enable the judicial machinery to protect and increase investment values rather than increasing causes of hazard and loss; and employing this Court's supervisory power to enforce the accepted and usual course of judicial proceedings such as allowing the defendant (Petitioner) herein participation in preparation of pre-trial Order.

For the foregoing additional reasons Petitioner respectfully seeks Writ of Certiorari directed to the 9th Circuit Court of Appeals.

Dated this 20th day of March, 1981.

J. R. CISSNA
Attorney Pro Se

APPENDIX A(1)*

ABCD A Business Communications Division

IN THE SUPREME COURT OF THE UNITED STATES

J.R.CISSNA and EVELYN CISSNA, Petitioner, v. ROY E. AMMAN, et al., Respondent Class	___Term, 1981 NO._____ CORRECTED AFFIDAVIT OF SERVICE BY MAIL OF PETITION FOR WRIT OF CERTIORARI

STATE OF WASHINGTON)
) ss:
COUNTY OF KING)

BARRY J. REISCHLING, being first duly sworn on oath, deposes and says: That he is a citizen of the United States of America and of the State of Washington, residing in King County of said state; that he is of legal age, not a party to the above-entitled action and competent to be a witness therein; that on February 5* 1981, affiant deposited an envelope in the United States mail properly stamped and addressed to the following:

*Original document filed with Clerk of the Court

APPENDIX A(2)

Mr. Joseph C. McKinnon
Jones, Grey & Bayley
14th Floor, Norton Bldg.
Seattle, Wa. 98104

Mr. Phillip Offenbacker
Short, Cressman & Cable
3000 Sea-First Nat'l
Bank Building
Seattle, Wa. 98154

Mr. Frank W. Payne
Payne & Verzani
30640 Pacific Hwy. So.
Federal Way, Wa. 98002

said envelope containing a copy of this affidavit and three copies of Petition for Writ of Certiorari. *I am informed"apparently the after hour mailing date resulted from the date on the postal meter being set forward before the actual expiration of the day".

/s/ Barry J. Reischling
Barry J. Reischling

APPENDIX A(3)

SUBSCRIBED AND SWORN TO before me on

February 12, 1981.

/s/ J. R. Cissna

J. R. Cissna
NOTARY PUBLIC in and for
the State of Washington,
residing at Seattle

Orig: U.S. Supreme Court
+ 40 copies

c.c. J. R. Cissna
aBCD

APPENDIX B(1) *

IN THE

SUPREME COURT OF THE UNITED STATES

J. R. CISSNA and EVELYN CISSNA, his wife,	)	NO. 80-1381
Petitioners,	)	
vs.	)	
ROY E. AMMAN, et al.,	)	
Respondent Class	)	

AFFIDAVIT CERTIFYING AS TO MAILING OF PETITION FOR WRIT OF CERTIORARI

STATE OF WASHINGTON)
) ss:
COUNTY OF K I N G)

The undersigned, being a member of the Bar of the United States Supreme Court, makes this affidavit on information, and belief that the Petition For Certiorari in the above case was filed by deposit in the United States mail postage prepaid of $17.08 on February 5, 1981 and said filing was accordingly within 90 days of the

*Original document filed with Clerk of the Court

entering of the attached Final Order denying rehearing filed November 7, 1980 in San Francisco, and received by mail, by J. R. Cissna on November 10, 1980.

The attached copy is further certified by me as a true photostatic copy of the copy of said Order as reviewed by me and received and provided me by J. R. Cissna, a member of the Washington State Bar, the Federal District Court Bar and the Ninth Circuit Court of Appeals.

/s/ Richard B. McNees

Subscribed and sworn to before me this 5th day of March, 1981.

/s/ J.H. Fisher

NOTARY PUBLIC in and for the State of Washington, residing at Seattle